

BEFORE THE
UNITED STATES COPYRIGHT ROYALTY JUDGES
LIBRARY OF CONGRESS
WASHINGTON, D.C.

In re

DETERMINATION OF ROYALTY
RATES AND TERMS FOR
EPHEMERAL RECORDING AND
DIGITAL PERFORMANCE OF SOUND
RECORDINGS (*WEB IV*)

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) DOCKET NO. 14-CRB-0001-WR
) (2016-2020)
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SOUNDEXCHANGE'S MOTION TO COMPEL THE NATIONAL ASSOCIATION OF
BROADCASTERS TO PRODUCE DOCUMENTS RESPONSIVE TO
SOUNDEXCHANGE'S REQUESTS

SoundExchange requests that the Copyright Royalty Judges order the National Association of Broadcasters ("NAB") to produce documents responsive to SoundExchange's requests for production that NAB has refused to produce. In particular, NAB refuses to produce documents that constitute, comprise, memorialize, or analyze NAB members' entry into webcasting. Such documents are directly related to NAB's Written Rebuttal Statement ("WRS"), in particular the testimony of Dr. Peterson. Because none of NAB's objections justify withholding documents, the Judges should order their production.

I. BACKGROUND

On February 26, 2015, SoundExchange served its requests on the Licensee Participants, including NAB. SoundExchange requested documents related to NAB members' entry into the webcasting market. Declaration of Rose Ehler (Ehler Decl.), Ex. 2 at 14 (Request No. 49). NAB refused to produce such documents. *Id.* at Ex. 11 at 13. During the meet-and-confer process, NAB explained that it viewed the documents requested as not sufficiently related to the

testimony of its witnesses in rebuttal. Although NAB acknowledged that Dr. Peterson addresses entry into the webcasting market, it argues that he did so based on SoundExchange data and not NAB members' information. NAB further objected on the ground that it should not be required to produce documents from its members, and on the ground that the witnesses who provided testimony in these proceedings would not have many documents in any event.

II. ARGUMENT

Non-privileged documents are discoverable if "directly related" to a participant's written statement. 37 C.F.R. § 351.5(b); Order on iHeart's Motion to Compel SoundExchange to Produce Documents in Response to Discovery Requests and on Issues Common to Multiple Motions at 3 (Jan. 15, 2015). Once a participant has put particular assertions at issue, it cannot prevent discovery of documents designed to test those assertions on the ground that they are not "directly related." To the contrary, documents that would contradict or "test" a particular assertion satisfy the "directly related" standard. Order Granting SoundExchange's Motion to Compel NAB to Produce Certain Financial Documents at 3 (Jan. 15, 2015).

The documents sought in this Motion seek to test particular assertions NAB has made in its WRS, and thus are within the scope of discovery. But, as has been its practice throughout this proceeding, NAB has once again produced a meager sample of documents in response to SoundExchange's requests for production – this time, just 60 documents. One of these documents comes from NAB itself, and the remaining 59 come from just one of its members – Lincoln Financial Media Company. Unless NAB means to only offer rebuttal evidence with respect to an appropriate rate for Lincoln Financial Media Company, SoundExchange is entitled to a more robust production of responsive documents.

With respect to the Request at issue in this Motion, NAB produced nothing. This request seeks documents related to NAB members' entry into the webcasting market, including, but not

limited to, any documents that tie the entry decision to the statutory rates, as well as any documents that more generally analyze NAB members' entry into the webcasting market. In refusing to produce any such documents, NAB has also taken the position that documents related to webcaster entry are not directly related to its rebuttal statement. This position is simply not tenable.

NAB's expert Steven Peterson put the issue of webcaster entry squarely at issue in his rebuttal testimony. Dr. Peterson purports to rebut David Blackburn's direct testimony regarding the vibrancy of the webcasting market. In so doing, he suggests that the numbers reflecting entry in the market are misleading and that, in fact, statutory rates have impeded growth in the commercial webcasting market. *See, e.g.*, Peterson WRT ¶¶ 16-17, 28-34. While Dr. Peterson offers no affirmative evidence to support his own position (and perhaps did not even review any such evidence provided by NAB), this fact certainly does not mean that documents in NAB's possession related to the issue are off limits. Under the Judges' well-established precedent, any such evidence omitted from Dr. Peterson's testimony would be as directly related to his testimony as evidence he elected to include. *See Order Denying, Without Prejudice, Motions for Issuance of Subpoenas Filed by Pandora Media, Inc. and the National Association of Broadcasters*, Docket No. 14-CRB-0001-WR, at 5-6 (Apr. 3, 2014). If anything, Dr. Peterson's failure to rely on any such evidence underscores that the responsive documents in NAB's possession need to be produced so that SoundExchange can put Dr. Peterson's testimony in appropriate context. Otherwise, his testimony that an "economically meaningful" analysis of webcaster growth demonstrates that high license fees are choking off growth threatens to distort the record. *See Peterson WRT ¶ 34.*

NAB has also refused to produce any documents responsive to this Request on the grounds that it should not have to collect documents from all of its members. While NAB offered just one fact witness in rebuttal, who arguably could be speaking for just his own company,¹ it has proffered expert testimony that sweeps far more broadly. NAB cannot present its case through experts as a means by which to shield its members from discovery. As the Judges recently observed, 37 C.F.R. § 351.5(b) requires production of all documents that are directly related to a participant's written rebuttal statement. *See* Order Granting SoundExchange's Motion To Compel the National Association of Broadcasters To Produce Certain Financial Documents, Docket No. 14-CRB-0001-WR, at 2-3 (Jan. 15, 2015). This provision "does not, on its face, require that requested documents be directly related to the [testimony] of a participant's 'witness.'" NAB's attempt to narrowly circumscribe its discovery obligations should be rejected. Without a broader sampling of documents, SoundExchange will be severely prejudiced in its ability to assess the completeness and accuracy of NAB's rebuttal statement.

In the meet-and-confer process, SoundExchange attempted to work with NAB to determine a smaller universe of its company members from whom NAB should produce documents. One query was whether NAB could produce documents sufficient to satisfy the request by limiting the production to companies that gave testimony in this proceeding. While NAB informed SoundExchange that it did not believe those members would have many documents relating to their own entry into the market, that does not mean the members will not have documents about other entrants into the market from the relevant time period. Ehler Decl. ¶

¹ Even this is questionable given that Mr. Dimick seems to make several pronouncements about simulcasters generally. *See, e.g.*, WRT ¶ 3 (asserting that Mr. Kooker's testimony is "not true as to simulcasters"); WRT ¶ 5 (describing what "simulcasters have been doing and are still doing").

20. SoundExchange thus proposes that NAB collect and review documents from the companies of those witnesses that provided testimony on behalf of NAB. That should strike the appropriate balance between NAB's hesitance to approach each of its members and SoundExchange's need to obtain a fulsome production.

III. CONCLUSION

Documents regarding entry into the webcasting market are indisputably directly related to NAB's WRS. The limitation proposed by SoundExchange reasonably accounts for NAB's purported burden. Documents responsive to Request No. 49 relating to webcaster entry should thus be produced.

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Respectfully submitted,

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